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No. 08-140

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TAMARA THOMPSON, *et al.*,

Petitioners,

v.

MICHAEL E. TURK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Counter-Statement of the Questions Presented

1) Did the Ninth Circuit properly hold that the statute of limitations on a design-and construction claim under the Fair Housing Act ("FHA") begins to run at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued?

2) Did the Ninth Circuit properly hold that, when a design-and-construction claim is asserted under the FHA, the allegedly discriminatory housing practice is a failure to design and construct, which is not an indefinitely continuing practice, but instead a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase?

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Statement of the Case

In 1997, defendant Ghores Construction Co. built a multifamily apartment development, the Villas at Rancho del Norte (the "Villas"), in North Las Vegas, Nevada. At the time of construction, defendant Michael E. Turk ("Turk" or "Respondent") was an officer of both Ghores Construction Co. and defendant Rancho del Norte Villas, Inc., the developer. *See Garcia v. Brockway*, 526 F.3d 456, 460 (9th Cir. 2008). On October 15, 1997, the City of North Las Vegas issued the final certificates of occupancy for the Villas. The Villas was later sold, in its entirety, through foreclosure on April 3, 2001. GMAC subsequently sold the property to THG Villas I, LLC, on September 4, 2002.

On July 25, 1997, Ronald Ray Smith ("Smith"), a member of plaintiff Disabled Rights Action Committee ("DRAC" or "Petitioner"), visited the Villas. On October 2, 1997, DRAC and Smith filed a housing discrimination complaint with HUD concerning alleged discriminatory conditions at the Villas. Accordingly, DRAC "tested" the Villas and filed a HUD complaint before the Villas received its final certificates of occupancy on October 15, 1997.

On April 30, 2001, HUD terminated the complaint because the complainants, as "testers," lacked standing. *See id.* The United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") subsequently held that testers have standing to sue under the Fair Housing Act ("FHA"). *See Smith v. Pacific Props. & Dev. Corp.*,

358 F.3d 1097, 1104 (9th Cir.), *cert. denied, Pacific Props. & Dev. Corp. v. Disabled Rights Action Comm.*, 543 U.S. 869 (2004).

On October 12, 2004, plaintiff Tamara Thompson ("Thompson" or "Petitioner"), another member of DRAC, "tested" the Villas and found alleged discriminatory conditions. *See Garcia*, 526 F.3d at 460. On February 4, 2005, plaintiffs Thompson and DRAC (collectively, "Petitioners") sued Turk, Rancho Del Norte Villas, Inc., Ghores Construction Co., William L. Ghores, Marc Gohres, and T. Allen Thompson, asserting an FHA design-and-construction claim. *Id.*

The United States District Court for the District of Nevada, Reed, J. (the "District Court"), granted defendants Marc Ghores and Ghores Construction's motion to dismiss and defendant Turk's separate motion to dismiss because the claim was time-barred. *See id.*

The Ninth Circuit granted the plaintiffs' motion to voluntarily dismiss the appeal as to Marc Ghores and Ghores Construction. Accordingly, the plaintiffs only appealed the District Court's order with respect to Turk. *See id.* This appeal was consolidated with Case No. 05-35647. A three-judge panel of the Ninth Circuit, *Garcia v. Brockway*, 503 F.3d 1092 (9th Cir. 2007) (2-1 decision), affirmed the District Court.

On rehearing en banc, the Ninth Circuit, in a *nine-two* majority decision, adopted the panel opinion and held that "an aggrieved person must bring a private

civil action under the FHA for a failure to properly design and construct within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued." *See Garcia v. Brockway*, 526 F.3d 456, 466 (9th Cir. 2008) (en banc) (Kozinski, C.J., writing for the majority). The Ninth Circuit further found that the discriminatory housing "practice is 'a failure to design and construct,' which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Id.* at 462.

Reasons for Denying the Petition

There is no genuine conflict between the decision below and decisions of this Court and other federal courts of appeal. Further, there is no urgent reason why this Court should grant certiorari; and the Court should wait until there is a well-developed conflict among the circuits. Accordingly, further review is not warranted.

I. Petitioners have failed to demonstrate a genuine conflict between the *Garcia* opinion and decisions of this Court and eleven other federal courts of appeal.

Petitioners fabricate an alleged conflict by focusing on 42 U.S.C. § 3604(f)(3)(B)[1], the FHA's "reasonable accommodations" provision, rather than on the provision that is *actually at issue*, § 3604(f)(3)(C), which governs

[1] All section references are to Title 42 of the United States Code unless otherwise stated.

"design-and-construction" claims. Petitioners contend that this Court and eleven federal courts of appeal "have construed the definition provided at § 3604(f)(3)(B)) [sic] as subordinate to the discriminatory housing practices described in § 3604(f)(1) and in § 3604(f)(2)." (Pet. at 9.) In other words, these courts have determined that § 3604(f)(3)(B) is not an independently-actionable "discriminatory housing practice"; rather, it merely defines the meaning of "discriminate" under § 3604(f)(1) and § 3604(f)(2). Accordingly, Petitioners maintain that these decisions conflict with *Garcia*, which concluded that § 3604(f)(3)(C) is a coordinate section that provides a cause of action separate from § 3604(f)(1) and § 3604(f)(2).

Petitioners' fabricated conflict is flawed for two reasons: (1) a genuine conflict does not exist because Petitioners' alleged conflicting cases are legally and factually dissimilar from *Garcia*; and (2) Petitioners' cases do not stand for the proposition that § 3604(f)(3)(B) is "subordinate" and merely "definitional," and does not operate as an independent prohibition.

Accordingly, there is no urgent reason why this Court should grant certiorari. Rather, the Court should wait until there is a well-developed conflict among the circuits. At present, the Ninth Circuit is the *only* federal court of appeals to have published a decision that considers when the statute of limitations begins to run in a design-and-construction claim under the FHA. Ten of the thirteen judges who considered this issue agreed that the statute is triggered at the conclusion of the design-and-construction phase. The lopsided nature of

the decision suggests that a genuine conflict among the circuits may never even arise. If it eventually does, however, this Court can always grant certiorari at that time after the issue has received further study by the lower courts.

A. Petitioners' alleged conflicting cases are legally and factually dissimilar from *Garcia*.

Petitioners have not raised a genuine conflict. None of the cases string cited at pages 9 and 10 of Petitioners' brief concern the same legal issue that was decided below. In *Garcia*, the Ninth Circuit considered "when the statute of limitations begins to run in a design-and-construction claim under the [FHA]." *Garcia*, 526 F.3d at 459. It determined that, for statute of limitations purposes, the discriminatory housing practice at issue was the "failure to design and construct a multifamily dwelling according to FHA standards[,]" as required by § 3604(f)(3)(C). *Id.* at 461. "The statute of limitations [wa]s thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued." *Id.* By contrast, Petitioners' cases all address "reasonable accommodations" claims under § 3604(f)(3)(B)[2] rather than design-and-construction claims under § 3604(f)(3)(C); and none of these cases involve an analysis of the statute of limitations contained in § 3613(a)(1)(A).

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[2] Section 3604(f)(3)(B) states that "[f]or purposes of this subsection, discrimination includes— . . . (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . . ."

In addition, the string-cited cases do not involve facts that are even remotely similar to those involved in *Garcia*. Petitioners' cases mainly involve municipal zoning decisions affecting housing for the disabled. *See, e.g.*, *Regional Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir.) (alleging that a city, its planning board and mayor discriminated by refusing to grant the plaintiff a special-use permit to establish two halfway houses), *cert. denied*, 537 U.S. 813 (2002). *Garcia*, on the other hand, involves alleged violations of design and construction requirements for handicapped access in multi-family dwellings. In light of the legal and factual dissimilarity between *Garcia*, on the one hand, and Petitioners' cases, on the other, Petitioners have failed to identify a genuine conflict within the federal courts of appeal based upon the string-cited cases.

B. Petitioners' cases do not stand for the proposition that § 3604(f)(3)(B) is "subordinate" to § 3604(f)(1) and § 3604(f)(2).

Petitioners' cases do not even stand for the proposition that § 3604(f)(3)(B) is "subordinate" to § 3604(f)(1) and § 3604(f)(2), is merely "definitional" and does not operate as an independent prohibition. In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995), "[t]he sole question before the Court [wa]s whether Edmonds' family composition rule qualifie[d] as a 'restriction regarding the maximum number of occupants permitted to occupy a dwelling' within the meaning of the FHA's absolute exemption." (quoting 42 U.S.C. § 3607(b)(1)). This Court "d[id] not decide whether Edmonds' zoning code provision defining

'family,' as the City would apply it against Oxford House, violate[d] the FHA's *prohibitions against discrimination* set out in 42 U.S.C. §§ 3604(f)(1)(A) and (f)(3)(B)." *Id.* at 732 n.4 (emphasis added). Accordingly, the Court's limited discussion of § 3604(f)(1)(A) and § 3604(f)(3)(B) can only be considered dictum.

This Court's references to § 3604(f)(3)(B), however, do not indicate that it is merely a definitional provision rather than an independently-actionable discriminatory housing practice. Notably, in two instances in the opinion, the Court refers to § 3604(f)(3)(B) as a "prohibition against discrimination." *See Oxford House, Inc.*, 514 U.S. at 732 n.4; *id.* at 738 ("It remains for the lower courts to decide whether Edmonds' actions against Oxford House violate the FHA's *prohibitions against discrimination* set out in §§ 3604(f)(1)(A) and (f)(3)(B).") (emphasis added).

In addition, the federal courts of appeal cases that Petitioners cite never use the term "subordinate" in describing § 3604(f)(3)(B) nor do they state that § 3604(f)(3)(B) *only* functions as a definitional provision and does not operate as an independent prohibition. *See Regional Econ. Cmty. Action Program, Inc.*, 294 F.3d at 48 (citing with approval, *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 790 (6th Cir. 1996), which, at page 794, analyzes a reasonable accommodations violation of the FHAA by considering, exclusively, the three "operative elements" in § 3604(f)(3)(B)); *Shapiro v. Camden Towers, Inc.*, 51 F.3d 328, 335 (2d Cir. 1995) (indicating that § 3604(f)(3)(B) creates a duty to provide reasonable accommodations that is independent of § 3604(f)(2): "*Pursuant to section*

3604(f)(3)(B), Cadman Towers is *required* to make reasonable accommodations in its rules and practices so as to enable Shapiro to 'use and enjoy [her] dwelling.'") (emphasis added)[3]; *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) ("*Pursuant to § 3604(f)(3)(B)*, the Township of Brick has '*an affirmative duty*' to make reasonable accommodations on behalf of handicapped persons.") (emphasis added); *Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442, 459 (3d Cir. 2002) ("As noted above, we have not previously addressed the 'necessity' and 'equal opportunity' factors of a *§ 3604(f)(3)(B) claim.*") (emphasis added); *Bryant Woods Inn v. Howard County*, 124 F.3d 597, 603 (4th Cir. 1997) ("The FHA thus *requires* an accommodation for persons with handicaps if the accommodation is (1) reasonable and (2) necessary (3) to afford handicapped persons equal opportunity to use and enjoy housing. *See 42 U.S.C. § 3604(f)(3).*") (emphasis added); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996) (stating that § 3604(f)(3)(B) "defines discrimination" but not addressing whether it still operates as an independent prohibition)[4]; *Smith & Lee Assocs., Inc.*, 102 F.3d at 794

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[3] The Second Circuit made clear that § 3604(f)(3)(B) operates as an independent prohibition in *Richard Salute v. Stratford Greens Garden Apartments, a Co-Partnership*, 136 F.3d 293, 302 (2d Cir. 1998) ("Economic discrimination . . . is not cognizable as a failure to make reasonable accommodations, *in violation of § 3604(f)(3)(b)*. Accordingly, we affirm the district court's rejection of plaintiffs' claims under the 'reasonable accommodations' provision of the FHAA.") (emphasis added).

[4] In *Groome Res. Ltd, LLC v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), the Fifth Circuit stated that § 3604(f)(3)(B) (Cont'd)

(analyzing a reasonable accommodations violation of the FHAA by considering, exclusively, the three "operative elements" in § 3604(f)(3)(B)); *id.* at 795 (citing *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994) (finding an "affirmative duty" to reasonably accommodate under § 3604(f)(3)(B)), *aff'd*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995)); *United States v. City of Palatine*, 37 F.3d 1230, 1232 (7th Cir. 1994) (accepting the plaintiff's reliance on § 3604(f)(3)(B) to show a *violation* of the FHA); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 250 (8th Cir. 1996) ("[T]he Act *requires* the City to make reasonable zoning ordinances when necessary to give a handicapped person 'equal opportunity to use and enjoy a dwelling.' *Id. § 3604(f)(3)(B)*") (emphasis added); *City of Edmonds*, 18 F.3d at 806 ("The FHAA imposes an *affirmative duty* to reasonably accommodate handicapped persons. *42 U.S.C. § 3604(f)(3)(B).*") (emphasis added); *id.* at 807 ("Many factors must be weighed to determine whether reasonable accommodation under 42 U.S.C. § 3604(f)(3)(B) was achieved."); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-02 (10th Cir. 1995) (suggesting that a reasonable accommodation claim arises under § 3604(f)(3)); *Ackerman v. Deaf and Hearing Connection of Tampa*

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operates as an independent prohibition. *See id.* at 202 ("In the scheme of the FHAA, the reasonable accommodations provision exists as a *prohibition on discrimination* against the disabled in the purchase, sale, or rental of housing. As set out in § 3604(f)(3)(B), the failure to reasonably accommodate the disabled in the context of housing is, itself, a defined act of discrimination.") (emphasis added).

Bay, Inc., 197 Fed. Appx. 879, 880-81 (11th Cir. 2006) (suggesting that a claim of discrimination in the non-renewal of an apartment lease arose under § 3604(f)(1)-(2), whereas a claim of failure to reasonably accommodate a request for a roommate arose under § 3604(f)(3)(B)); and *Samaritan Inns v. District of Columbia*, 114 F.3d 1227, 1239-40 (D.C. Cir. 1997) (accepting the notion that a reasonable accommodation claim arises under § 3604(f)(3)(B)).

The *only case* that Petitioners cite that addresses § 3604(f)(3)(C) — the provision actually at issue in *Garcia* — is an unpublished decision, *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469 (6th Cir. 2006), *cert. denied, WKB Assocs., Inc. v. Fair Housing Council, Inc.*, 128 S. Ct. 880 (2008). At the time *Village of Olde St. Andrews* was decided, citation of unpublished decisions within the Sixth Circuit was *disfavored*, except for the purpose of establishing res judicata, estoppel, or the law of the case. *See* 6th Cir. R. 28(g). While citation of unpublished opinions is now permitted, *see* 6th Cir. R. 28(e), "an unpublished decision . . . is *not precedentially binding* under the doctrine of stare decisis, but is considered by [the Sixth Circuit] for its *persuasive value only*." *United States v. Sanford*, 476 F.3 391, 396 (6th Cir. 2007) (emphasis added). Accordingly, as an unpublished opinion, *Village of Olde St. Andrews* is not even binding precedent within the Sixth Circuit.

Moreover, *Village of Olde St. Andrews* has little persuasive value because it is not a well-reasoned

decision.[5] The Sixth Circuit concludes that "the statutory language of 42 U.S.C. § 3604(f) specifically makes the design and construction of inaccessible housing units unlawful *in the context of the sale or rental* of the units[,]" 210 Fed. Appx. at 481 (emphasis added), without even addressing the language of § 3604(f)(3)(C) or its textual significance. Indeed, § 3604(f)(3)(C) — the only FHA provision that specifically discusses design-and-construction discrimination — is only mentioned one time by the court, in passing; and the provision's language is not even referenced in the opinion. *See Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. at 481 ("[T]he language appearing in 42 U.S.C. § 3604(f)(1) prohibiting owners of those developments from otherwise making unavailable accessible housing serves as a catch-all provision to cover other ways that an individual may make housing unavailable to the disabled beyond the forms of discrimination listed in 42 U.S.C. § 3604(f)(3)(C).").

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[5] *Village of Olde St. Andrews* specifically holds that "the statute of limitations does not begin to run in actions alleging [that the owner or developer engaged in a policy or practice throughout the entire development of constructing housing units that fail to comply with the FHA,] until the last noncompliant unit is sold." 210 Fed. Appx. at 481. This holding is "explicitly limit[ed] . . . to the facts of th[e] case." *Id.* at 479. In addition, the case "does not address the operation of the statute of limitations in Fair Housing Act cases alleging disability discrimination in the rental of newly constructed multi-family dwellings." *Id.* at 481 n.6. Accordingly, *Village of Olde St. Andrews* narrowly applies to *policy or practice cases* involving the *sale* of multifamily dwellings.

As *Village of Olde St. Andrews* is neither binding precedent nor persuasive authority, it does not present a genuine conflict that warrants granting certiorari.[6]

Petitioners have failed to demonstrate a genuine conflict between the *Garcia* opinion and decisions of this Court and eleven other federal courts of appeal. Accordingly, this proffered reason for granting the Petition must be rejected.

II. There is no urgent reason why this Court should grant certiorari, and the Court should wait until there is a well-developed conflict among the circuits.

Petitioners argue that the questions presented are important because "[t]he Ninth Circuit's limitation on private suits undermines the FHA's most important enforcement mechanism — private suits." (Pet. at 21.) The situation is not as dour, however, as Petitioners would have this Court believe. As the Ninth Circuit determined that the design and construction of an FHA-noncompliant building alone, without the sale or rental of individual units, is actionable under the FHA, the disabled can now bring their § 3604(f)(3)(C) claims during the design and construction phase. *See Garcia*, 526 F.3d at 461 n.1; *see also United States v. Edwards Rose & Sons*, 384 F.3d 258, 260 (6th Cir. 2004) (upholding a preliminary injunction prohibiting the construction of an inaccessible building entrance).

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[6] Indeed, this Court was aware of the *Garcia* opinion when it recently denied *Village of Olde St. Andrews* certiorari on January 7, 2008.

With reasonable diligence, disabled individuals and advocacy groups can discover an FHA-noncompliant building early on in the design and construction phase. They can monitor multifamily projects through public-approval hearings and submissions to approval boards, and they can review building plans and visit construction sites. For a four-hundred-unit apartment complex, it takes approximately twelve to eighteen months from the time the first building permit is pulled to construct an apartment and receive the final certificate of occupancy.

Accordingly, under *Garcia*, which makes the design and construction alone actionable, the statute of limitations has effectively been *extended* from two years to three or three-and-a-half years since claims can be brought well before the issuance of the final certificate of occupancy.[7] Thus, contrary to Petitioners' assertion, the Ninth Circuit's decision *does not undermine* private suits.[8] Instead, it encourages the disabled to get involved

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[7] Here, for example, Petitioner DRAC originally tested the Villas on July 25, 1997. DRAC filed its HUD complaint on October 2, 1997. The final certificates of occupancy for the Villas were not issued until October 15, 1997. Disregarding the tolling effect of the HUD complaint, under *Garcia*, the two-year statute of limitations would not have even begun to run until October 15, 1997. Accordingly, in effect, DRAC had almost twenty-seven months to bring its design-and-construction claim.

[8] Notably, remedies continue to exist after the statute has run on a design-and-construction claim: the disabled can still seek reasonable modifications and accommodations under § 3604(f)(3)(A) and § 3604(f)(3)(B), respectively; where there has been a pattern or practice of resistance to FHA rights, or a group's denial of rights raises an issue of general public

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early on in the design and construction process when it is easier and less expensive for developers to remedy FHA-noncompliant features.

III. The Ninth Circuit's reading of the FHA's statute of limitations accords with both the statute's language and the relevant non-textual considerations.

In *Garcia*, the Ninth Circuit logically began its analysis of when the statute of limitations begins to run in a design-and-construction claim under the FHA with an examination of the applicable statute of limitations:

> The FHA provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). In other words, an aggrieved person must bring the lawsuit within two years of either "the occurrence . . . of an alleged discriminatory housing practice" or

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importance, the Attorney General has three years to bring a claim for monetary damages, 28 U.S.C. § 2415(b), and five years to seek civil penalties, 28 U.S.C. § 2462; *see Garcia*, 526 F.3d at 460; *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1143-44 (D. Idaho 2003); and the Attorney General can always bring a claim for injunctive relief. *See* 42 U.S.C. § 3614(a); *Garcia*, 526 F.3d at 460; *United States v. Inc. Village of Island Park*, 791 F. Supp. 354, 368 (E.D.N.Y. 1992).

> "the termination of an alleged discriminatory housing practice."

526 F.3d at 460-61.

A. The Ninth Circuit correctly determined that the "discriminatory housing practice" involved in a § 3604(f)(3)(C) claim is a failure to design and construct according to FHA standards.

The Ninth Circuit reasonably concluded that in a *design-and-construction* claim, the "discriminatory housing practice" is the "'failure to design and construct' a multifamily dwelling according to FHA standards." *Id.* at 461. "The statute of limitations is thus triggered at the conclusion of the design-and construction phase, which occurs on the date the last certificate of occupancy is issued." *Id.*

The en banc majority rejected the dissent's assertion that the discriminatory housing practice at issue is the sale or rental of an FHA-noncompliant unit rather than the design and construction of the building. As § 3604(f)(3)(C) "is a coordinate section, not a subordinate section within (f)(1) or (f)(2)," the majority concluded that "treating (f)(3)(C) as subordinate makes no structural sense." *Id.* at 461 n.1. Moreover, defining the act of selling or leasing an FHA-noncompliant unit as the discriminatory housing practice "confuses the 'discrete act of alleged . . . discrimination' with the 'date when the effects of this practice were felt.'" *Id.* at 462 n.4 (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2168 (2007)). "The failure to design and construct the unit according to FHA standards is the

'underlying' discrete act of discrimination[,] . . . and the date of this underlying act 'governs the limitations period.'" *Id.* (internal citations omitted) (quoting *Ledbetter*, 127 S. Ct. at 2169 (quoting *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989))).

B. The Ninth Circuit properly rejected the Petitioners' theory that an FHA design-and-construction violation is a continuing one that does not terminate until the building defects are cured.

The Ninth Circuit explained that "Plaintiffs and HUD[9] confuse a continuing violation with the continuing effects of a past violation." *Garcia*, 526 F.3d at 462. The discriminatory housing "practice is 'a failure to design and construct,' which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Id.* "Although the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failure to design and construct is a single instance of unlawful conduct." *Id.* at 463.

The court noted that if it were to adopt the continuing violation theory, "the FHA's statute of limitations would provide little finality for developers who would be required to repurchase and modify (or

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[9] The Ninth Circuit considered HUD's *Fair Housing Act Design Manual* in its analysis and gave it proper *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), weight. *See Garcia*, 526 F.3d at 462 n.3.

destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers." *Id.* "This is not what Congress provided in erecting a two-year statute of limitations for FHA design-and-construction claims." *Id.* "If Congress wanted to leave developers on the hook years after they cease having any association with a building, it could have phrased the statute to say so explicitly." *Id.*

C. The Ninth Circuit properly rejected the Petitioners' "encounter" theory.

The Petitioners argued below that because an FHA damages action "sounds basically in tort," the statute of limitations is not triggered until a disabled person encounters the design-and-construction defect and is actually damaged by the practice. The court admonished, however, that the Petitioners "make too much of the Supreme Court's observation that the FHA 'sounds basically in tort.'" *Id.* at 464. In *Curtis v. Loether*, 415 U.S. 189, 195 (1974), the Supreme Court "was not dealing with the statute of limitations but with the very different question of whether FHA plaintiffs are entitled to a jury trial." *Garcia*, 526 F.3d at 464. "This passing reference to tort law cannot be read to trump statutory provisions that deal expressly with the statute of limitations." *Id.*

"The FHA's limitations period does not start when a particular disabled person is injured by a housing practice, but by 'the occurrence or the termination of an alleged discriminatory housing practice.'" *Id.* (quoting 42 U.S.C. § 3613(a)(1)(A)). "Under the FHA,

the ability to privately enforce the 'new legal duty' thus only lasts for two years from the time of the violation, and the violation here is a 'failure to design and construct.'" *Id.* (quoting § 3604(f)(3)(C)).

The court deemed the encounter theory further undercut by its implication that "any individual with a disability who merely observes the design-and-construction defect could bring suit-even if the limitations period had long run for every tenant and/or owner." *Id.* at 465. Further, a tester "'could always start a new clock running by returning to the building'" *Id.* (quoting Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. Rich. L. Rev. 753, 859 (2006) (footnote omitted)). "The encounter theory thus 'raise[s] serious equitable issues with respect to timeliness[]'because it strips the statute of limitations of all meaning." *Id.* (citation omitted) (quoting Schwemm, *supra*, at 859).

Accordingly, contrary to Petitioners' assertions, the FHA's language and the relevant non-textual considerations support the Ninth Circuit's construction of the statute of limitations in a design-and-construction claim. The decision below was correctly decided.

Conclusion

There is no genuine conflict between the decision below and decisions of this Court and other federal courts of appeal. As there is no urgent reason why this Court should grant certiorari, the Court should wait until there is a well-developed conflict among the circuits. Further, the Ninth Circuit's reading of the FHA's statute of limitations is in harmony with the statutory language and the relevant non-textual considerations. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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